

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

EVERETT V. REEDY,)	
)	
Petitioner,)	Civ. No. 04-525-TC
)	
vs.)	
)	
)	FINDINGS AND RECOMMENDATION
)	
SHARON BLACKETTER,)	
)	
Respondent.)	

Coffin, Magistrate Judge:

Before the court is petitioner's Amended Petition for Writ of Habeas Corpus (#9). For the reasons that follow, the petition should be denied.

Background

This case stems from events that transpired on March 3, 1998. Petitioner, his girlfriend, Kolena Bruce, and their two-year-old son visited the home of Kolena's parents. Tr. 186, 192. Petitioner and Kolena's father testified that petitioner consumed beers and rum-and-coke drinks that evening between 4:00 to 5:00 and 9:40. Tr. 195, 215. Petitioner installed a car seat in the back of his Chevrolet Camaro, secured his child in it, and drove off with Kolena in the passenger seat. Tr. 217. Approximately

1 two miles from the home of Kolena's parents, petitioner attempted
2 to overtake another car in a no-passing zone, along a curve in
3 the road. Tr. 118-27, 149, 173-80. Petitioner's vehicle entered
4 an oncoming traffic lane between a median and concrete wall and
5 struck a van. Tr. 84, 124. Kolena died, and petitioner's son
6 suffered a fractured clavicle. Tr. 116, 124.

7 Petitioner stated that he felt an alcohol "buzz" at the time
8 of the accident. Witnesses at the crash scene, investigating
9 officers, and hospital staff opined that petitioner was
10 intoxicated. Three hours after, his blood alcohol content was
11 .12 percent. Tr. 50, 54, 66, 67, 85, 116, 160, 168, 225.

12 After a jury trial, petitioner was convicted of the
13 Manslaughter in the First Degree, Recklessly Endangering Another
14 Person, Reckless Driving, and Driving Under the Influence of an
15 Intoxicant. The manslaughter verdict was nonunanimous. Tr. 311-
16 12.

17 Petitioner sought direct review in the Oregon Court of
18 Appeals, which affirmed the judgment of the circuit court without
19 an opinion. The Oregon Supreme Court denied review. Resp. Ex.
20 106, 107. Petitioner was denied post-conviction relief in
21 Umatilla County court, the Oregon Court of Appeals, and Oregon
22 Supreme Court. Resp. Ex. 124, 128-29. Petitioner filed a second
23 petition in Umatilla County Court for post-conviction relief
24 raising claims of ineffectiveness and procedural unfairness due
25 to the nonunanimous verdict. It was dismissed as successive.
26 Resp. Ex. 131. The matter was remanded after appeal because
27 petitioner filed as an indigent person and was not appointed
28 counsel. Resp. Ex. 134-36. On remand, the petition was

1 dismissed as time-barred and successive. Resp. Ex. 137-39. On
2 appeal, the Oregon Court of Appeals granted summary affirmance in
3 favor of the respondent, and the Oregon Supreme Court denied
4 review. Ex. 140-47.

5 Petitioner filed a Petition for Writ of Habeas Corpus in
6 this court pro se, alleging a number of grounds for relief (set
7 forth infra). His counsel later filed an Amended Petition for
8 Writ of Habeas Corpus alleging three new claims: violation of
9 due process and equal protection as a result of his manslaughter
10 conviction by a nonunanimous jury; ineffectiveness of trial
11 counsel for failing to challenge the nonunanimous verdict; and
12 ineffectiveness of appellate counsel for failing to advance that
13 issue on appeal.¹ Petitioner's counsel "incorporated by
14 reference" petitioner's claims forwarded in the initial pro se
15 petition.

16 Respondent asserts that the new claims in the amended
17 petition should be denied because they fail to "relate back" to
18 those set forth in the pro se petition. Respondent further
19 argues that the court should dismiss claims in the pro se
20 petition because they were not traversed by petitioner's counsel.
21 In the alternative, respondent asserts that the claims in both
22 petitions fail because they are unexhausted, procedurally
23 defaulted, and lack merit. As explained below, the court
24 recommends dismissal of petitioner's claims.

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26
27 ¹ Petitioner parses the first claim into two separate claims,
28 based on different constitutional theories. For the purposes of this
opinion, I treat them as a single claim of trial court error.

Discussion

Claims in Initial Petition

As an initial matter, I must resolve the reviewability of claims in petitioner's initial petition, which were not properly included in the amended petition under LR 15. LR 15(c) requires a party submitting an amended pleading to reproduce the entire pleading and describe the changes made. It also prohibits a party from incorporating by reference claims in the superseded pleading, which petitioner attempted to do in his motion to amend. In the amended petition, petitioner recites that the claims asserted in his initial, pro se pleading are "incorporated" into the amended pleading, which asserts three new claims. He did not set forth the initial claims in his subsequent pleading. In doing so, petitioner failed to comply with LR 15(c).

Only one of the claims raised in petitioner's initial pleading is argued in petitioner's briefing. Even if that claim were properly before this court, it should be dismissed. He asserts that he was denied effective trial court representation because his attorney failed to adduce testimony from the father of petitioner's girlfriend (Bunce) that the Camaro had not been operating properly. In petitioner's view, that omitted testimony, when combined with the fact that petitioner was sober enough to install a car seat before departing, would have made a difference in the outcome of the case.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may not grant habeas relief

4 Findings and Recommendation

1 regarding any claim "adjudicated on the merits" in a state court
2 unless the state court ruling "was contrary to, or involved an
3 unreasonable application of, clearly established Federal Law, as
4 determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). The
5 Supreme Court has explained that a state court decision is
6 "contrary to" federal law under the AEDPA if it either fails to
7 apply the correct Supreme Court authority or applies the correct
8 controlling authority to a case involving "materially
9 indistinguishable" facts but reaches a different result.
10 Williams v. Taylor, 529 U.S. 362, 405-07, 413 (2000). Similarly,
11 a state court decision is an unreasonable application of federal
12 law "if the state court identifies the correct governing legal
13 principle from [the Supreme] Court's decisions but unreasonably
14 applies that principle to the facts of the prisoner's case."
15 Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (citations omitted).

16 "In Williams and in subsequent decisions the Supreme Court
17 has repeatedly emphasized that 'an unreasonable application of
18 federal law is different from an incorrect application of federal
19 law.'" Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003)
20 (quoting Williams, 529 U.S. at 410). Thus, "[t]he petitioner
21 must demonstrate not only that the state court's application of
22 governing federal law was erroneous, but also that it was
23 objectively unreasonable." Ramirez v. Castro, 365 F.3d 755, 762
24 (2004) (citing Andrade, 538 U.S. at 75); see also Penry v.
25 Johnson, 532 U.S. 782, 793 (2001); Clark, 331 F.3d at 1068-69
26 (discussing Andrade and the appropriate standard of review).

27 In ineffective assistance of counsel cases, the federal law
28 in question is the Strickland standard, which states that a

1 defendant alleging a Sixth Amendment violation must demonstrate
2 "a reasonable probability that, but for counsel's unprofessional
3 errors, the result of the proceeding would have been different."
4 Strickland v. Washington, 466 U.S. 668, 694 (1984). Thus, the
5 task of the habeas court is to consider whether the post-
6 conviction court implemented an unreasonable application of
7 Strickland when it determined that petitioner was not denied
8 effective assistance of counsel.

9 Petitioner bears the burden of proving, by a preponderance
10 of the evidence, the underlying facts supporting the ineffective
11 assistance of counsel claim. See ORS 138.620(2). Moreover, 28
12 U.S.C. § 2254(d) creates a presumption that state court findings
13 of fact, after a hearing on the merits, are correct.

14 In this case, the post-conviction court did not implement an
15 unreasonable application of Strickland. At trial, Bunce
16 testified in response to defense counsel questioning. He stated
17 that he had driven the Camaro "several times" until "a little
18 over a month" before the accident. When asked about the car's
19 condition, Bunce testified, "The car appeared to be fine." Tr.
20 218. Bunce's post-conviction affidavit was inconsistent with
21 that testimony. He averred instead that the car had a history of
22 mechanical defects. Resp. Ex. 110. In the same affidavit,
23 respondent points out, Bunce averred that petitioner was not
24 intoxicated when he drove away after an afternoon of drinking.

25 The post-conviction court determined that Bunce was not
26 credible. Resp. Ex. 122. The post-conviction court further
27 observed that if the trial court attorney dissuaded Bunce from
28 testifying, it was within the range of tactical choice under

1 Strickland, and thus petitioner's trial attorney did not err by
2 failing to adduce testimony on the issue of the car's mechanical
3 condition. Indeed, the trial attorney asked Bunce under oath how
4 the car operated. It was not unreasonable for the post-
5 conviction court to understand Bunce's affidavit as a post hoc
6 rationalization of the accident. In view of Bunce's trial
7 testimony and the trustworthiness of Bunce's post-trial
8 affidavit, which maintained that petitioner was not intoxicated,
9 I cannot agree that the post-conviction court erred in concluding
10 that trial counsel's conduct in this respect was adequate.
11 Because the trial counsel representation did not fall below the
12 standard of care required, I need not consider whether the
13 allegedly neglected testimony would have made a difference in the
14 outcome of the case.

15 In sum, even if this ineffectiveness claim were properly
16 before the court, I would conclude that the post-conviction court
17 did not implement an unreasonable application of the Strickland
18 standard.

19
20 Claims in Amended Petition

21 The court is left with the following three claims in the
22 amended petition: The trial court erred in permitting petitioner
23 to be convicted on the manslaughter charge after a nonunanimous
24 verdict; trial counsel was ineffective to failing to preserve an
25 objection to the nonunanimous jury verdict; and appellate counsel
26 was ineffective for failing to raise the nonunanimous jury
27 verdict issue on appeal.

28 Respondent argues that those claims are untimely under AEDPA

7 Findings and Recommendation

1 because they were brought after the limitation period expired and
2 do not relate back to claims set forth in the initial petition,
3 as required by Federal Rule of Civil Procedure 15(c)(2). The
4 relation-back standard of Rule 15, which permits new claims in an
5 amended petition that share a common core of operative facts with
6 those in the original pleading, governs in federal habeas cases.
7 Mayle v. Felix, 545 U.S. 644, 664 (2005) ("[s]o long as the
8 original and amended petitioner state claims that are tied to a
9 common core of operative facts, relation back will be in order").

10 In Mayle, the Supreme Court clarified amendment of habeas
11 petitions filed under the AEDPA, and its corresponding one-year
12 statute of limitations provision, 28 U.S.C. § 2244(d)(1). The
13 Court construed Fed. R. Civ. P. 15(c)(2)'s relation-back
14 principle and held that amended habeas claims only relate back to
15 "timely" habeas claims when such claims are tied to a common core
16 of operative facts. The Supreme Court held that a claim in an
17 amended petition does not relate back (so as to avoid the statute
18 of limitations bar) "when it asserts a new ground for relief
19 supported by facts that differ in both time and type from those
20 the original pleading set forth." Id. at 650.

21 In petitioner's initial petition, he raised a number of
22 various grounds for relief, summarized here:

23
24 (1) challenge to constitutionality of Measure 11 under
25 the federal constitution;

26 (2) trial court error for (a) not dismissing a juror
27 who knew the prosecuting attorney; (b) making
28 derogatory remarks in the jury's presence; (c) failing
to order the prosecutor to produce the warrant that
allowed the search of petitioner's car;

1 (3) defense counsel ineffectiveness for (a) limiting
2 petitioner's participation at trial; (b) failing to
3 object to certain evidence; (c) failing to interview
4 accident witnesses and cross-examine a prosecution
5 witness, or present evidence concerning the Camaro's
6 mechanical condition; (d) failing to present evidence
of police and prosecutorial misconduct and flaws in
sobriety and blood alcohol testing; (e) stating during
opening argument that petitioner would be held
accountable for his wife's death; and (f) not allowing
petitioner to testify;

7 (4) prosecutorial misconduct in procurement of a
8 warrant and in testimony before grand jury; and,

9 (5) post-conviction court error in imposing attorney
fees.

10 In none of those initial claims did petitioner challenge the
11 nonunanimous jury verdict, nor did he challenge the adequacy of
12 his trial and appellate attorneys' representation for failure to
13 challenge the nonunanimous verdict. Under Mayle, the new claims
14 are impermissible because they assert grounds for relief that are
15 "supported by facts that differ in both time and type from those
16 the original pleading set forth." 545 U.S. at 650.

17 In respondent's view, because they do not relate back to the
18 claims in the initial pleading, they cannot be rescued from
19 AEDPA's time bar. Because 224 days transpired after his direct
20 appeal was final and before tolling was triggered by his petition
21 for post-conviction relief, petitioner's AEDPA time limit
22 extended 141 days after his post conviction judgment became
23 final, which was May 5, 2004. See 28 U.S.C. § 2244(d)(2) (AEDPA
24 limitation period is tolled while state post-conviction
25 proceedings are pending). The amended petition was filed on May
26 17, 2005, about seven months after his time limit expired. Thus,
27 respondent explains, the claims are time barred.

1 Petitioner asserts that the claims are timely because they
2 are based on the Supreme Court's ruling in Blakely v. Washington,
3 542 U.S. 296 (2004), which should confer a retroactive right to
4 an unanimous jury verdict. Under those circumstances, petitioner
5 argues, the one-year AEDPA statute of limitation began to run
6 when Blakely was announced, June 24, 2004. Petitioner asserts
7 that because he acted to invoke the purported right within a
8 year, in his post-conviction case and by filing his amended
9 petition for writ of habeas corpus in this court, his claim is
10 timely.

11 Petitioner's argument is predicated on the existence of a
12 two-part ruling that this court will not recommend. Petitioner
13 must first demonstrate that Blakely confers the right to a trial
14 that requires a unanimous jury verdict. If petitioner succeeds
15 on that front, he must then establish that such a right should be
16 applied retroactively to cases on collateral review. As I
17 explain, this position is simply not supported in Blakely.

18 First, the court does not agree that Blakely guarantees a
19 right to a unanimous jury verdict. Petitioner's argument is as
20 follows: Blakely announced a new Sixth Amendment right to
21 unanimous jury verdicts in criminal cases. In doing so, it
22 overturned prior plurality rulings to the contrary in Apodaca v.
23 Oregon, 406 U.S. 404 (1972), and Johnson v. Louisiana, 406 U.S.
24 356 (1972), whose authority was "less than binding" because the
25 plurality opinions were based on split analyses. The Blakely
26 Court resolved the issue, petitioner argues, when it
27 characterized the rule of Apprendi by stating:

28 This rule reflects two longstanding tenets of common-

1 law criminal jurisprudence: that the "truth of every
2 accusation" against a defendant "should afterwards be
3 confirmed by the unanimous suffrage of twelve of his
4 equals and neighbors," 4 W. Blackstone, Commentaries
5 on the Laws of England 343 (1769) and that "an
6 accusation which lacks any particular fact which the
7 law makes essential to the punishment is ... no
8 accusation within the requirements of the common
9 law, and it is no accusation in reason," 1 J. Bishop,
10 Criminal Procedure § 87, p. 55 (2d ed. 1872).

11 Blakely, 542 U.S. at 301-02 (emphasis added). In other words,
12 petitioner essentially argues that this court should extricate a
13 unanimity requirement from Blakely dictum, based on (1) the
14 Court's apparent presupposition that such a requirement exists,
15 (2) which it disclosed by way of a Blackstone quotation used to
16 summarize Apprendi. Petitioner adduces authority supporting the
17 proposition that, when a majority decision (such as Blakely)
18 calls into question a prior plurality analysis, a lower court may
19 consider whether the prior opinion has been overturned and may
20 follow the later decision.

21 The court appreciates petitioner's reasoning but disagrees
22 with his contention that Blakely overruled Apodaca and Johnson on
23 the question whether the jury trial right requires a unanimous
24 verdict in criminal trials. In petitioner's view, because
25 Apodaca was a plurality opinion with split analyses, the Apodaca
26 holding reduces to the "position taken by the justices who
27 concurred in the judgments on the narrowest grounds." Marks v.
28 United States, 430 U.S. 188, 193 (1977). The narrowest ground,
petitioner observes, is Justice Powell's position that a
unanimous jury verdict is guaranteed by the Sixth Amendment but
not incorporated to the states by the Fourteenth Amendment.
Petitioner also observes that no other justice joined in that

1 position, so characterizing it as the "plurality holding" is
2 problematic.

3 Whether or not I share petitioner's understanding of the
4 Apodaca holding,² I do not understand Blakely to have addressed,
5 much less overturned, Apodaca's answer to whether a unanimous
6 verdict is constitutionally required in state courts. The
7 Blakely Court addressed the question whether enhancement of
8 sentences based on facts not found by a jury violates the federal
9 jury trial right. The Blakely case arose from a state in which
10 unanimous jury verdicts are required in criminal trials. The
11 question whether nonunanimity violates the federal constitution
12 was not before the Blakely Court and was not a part of the
13 Court's analysis.

14 Further, the Blackstone quotation used to describe the
15 Apprendi holding described "common-law criminal jurisprudence"
16 reflected in the Apprendi case, which also arose from a state
17 that required unanimous verdicts and did not raise the
18 nonunanimity issue. I do not disagree that Blackstone understood
19 unanimous verdicts as a hallmark of common-law criminal process.
20 But I cannot assume that the Blakely Court intended to overturn
21 Apodaca so quietly, and simply by excerpting a single,
22 eighteenth-century, broadbrush description of common law.
23 Rather, the quotation formed part of a backdrop for framing
24 Apprendi, and the matter of unanimity had no role in the Blakely
25 analysis.

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27 ² Because Justice Powell's position was unique, the applicability
28 of the Marks standard for assessing plurality holdings is of little
use in this case.

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6 Dated this 14 day of December, 2007.
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11 _____
12 THOMAS M. COFFIN
13 United States Magistrate Judge
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